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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-143

STANLEY DUBOFF,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit which affirmed a judgment of conviction and sentence of the United States District Court for the Southern District of New York entered after a jury verdict finding Petitioner guilty of four counts of an Information charging him with violations of and conspiracy to violate various sections of the Securities Act of 1933, as amended, the Securities and Exchange Act of 1934, as amended and Rules and Regulations of the Securities and Exchange Commission promulgated pursuant thereto.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit appears as "Appendix A". The opinion is not yet reported.

Jurisdiction

The judgment of the Court of Appeals is dated June 26, 1975 and was entered on that date. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28 U.S. Code, Section 1254(1).

Questions Presented

1. Does an Information adequately advise a defendant of the charges against him when it merely charges in the generic language of the statutes involved and fails to provide him with a statement of all of the facts and circumstances constituting the specific offense alleged to come under the general description?

2. Where an Information under the heading "Means of Conspiracy", sets forth only a limited number of facts relating to the general charges, may a defendant be convicted of misrepresentations, false pretenses and fraudulent schemes with respect to which no facts are set forth in the Information?

3. May a defendant be convicted on the basis of misrepresentations and fraudulent schemes which were never presented to the Grand Jury which indicted him?

4. Is a conviction valid where the trial court, in its charge, left to the jury's recollection or judgment the question of which misrepresentations and frauds might be used as a basis for conviction, thereby permitting a conviction to rest on misrepresentations and frauds found by the jury to exist, although not specified in the Information and perhaps not even intended to be charged by the prosecution.

Statement of the Case

This is a criminal prosecution based upon a four-count Information which, at the suggestion of the trial court and

with the consent of all parties, superseded a sixteen-count Indictment at the outset of the trial. The Court suggested condensing fourteen identical counts charging mailings as part of a fraudulent scheme, into two counts for the purpose of simplifying the case for the jury with the understanding, however, that the case would proceed in all respects as it would have under the Indictment.

Count 1 charged Petitioner and others with a conspiracy to violate various sections of the Federal Securities Laws. Counts 2 and 3 charged defendants with fraud in the offer and sale of securities in violation of Title 15 U.S.C., Sections 77q and 77x. Count 4 charged the defendants with mailing a false and misleading offering circular in violation of Title 15 U.S.C., Sections 77j and 77x.

Count 1, the conspiracy count, after charging generally that Petitioner and various other persons conspired to violate various sections of the Federal Securities Laws, sets forth the purposes of the conspiracy in general terms, tracking the language of the statutes involved. These charges in substance, were as follows:

> (a) that defendants would use and mail false and misleading offering circulars of Richards Packing Co. ("Richards") (Count I, paragraph 7);
>
> (b) that they would employ devices, schemes and artifices to defraud, obtain money or property by means of untrue statements of and omissions to state material facts, and engage in transactions, practices and courses of business which would operate as a fraud upon purchasers of Richards' stock (Count I, paragraph 8);
>
> (c) that they would devise a scheme and artifice to defraud purchasers of Richards' stock and to obtain money by means of false and fraudulent pretenses, representations and promises (Count I, paragraph 9); and

(d) that they would employ manipulative devices and schemes in connection with the purchase and sale of Richards' stock (Count I, paragraph 10).

The only specific fact set forth in these, the charging paragraphs, is the identity of the stock as that of Richards.

During the trial, Petitioner moved to dismiss the Information on the ground that it failed adequately to advise him of the charges against him. That motion was denied.

The Court of Appeals, although finding that "the Information is far from a model of clarity and precision" refused to conclude that "the conspiracy count, taken as a whole, was so deficient as to be constitutionally infirm" (Opinion, page 4415).

In arriving at this result, the Court of Appeals relied on the specificity allegedly added to the conspiracy count by certain paragraphs designated "Means of the Conspiracy". These paragraphs did not amplify the charging paragraphs or describe the conspiracy. Instead, they purportedly set forth *some* of the means by which defendants allegedly carried out the conspiracy. These "Means" paragraphs were not, in any way, tied into the charging paragraphs. Moreover, they did not provide any specific information relating to most of the charges, particularly the alleged misrepresentations which were at the heart of the government's case. In addition, they failed to describe the fraudulent schemes, the deceitful practices or the fraud and deceit. Moreover, nowhere was there any identification of the victims or the money or property of which they were allegedly deprived.

The Court of Appeals did not explore the question of whether the Indictment set forth all of the material facts and circumstances of the offense, as required by this Court in *United States* v. *Hess,* 124 U.S. 483, 8 S. Ct. 571 (1888) and in *Russell* v. *United States,* 369 U.S. 749, 82 S. Ct. 1038 (1962). It was satisfied to conclude that the means

paragraph "adds specificity to these broad allegations." This approach apparently stemmed from the opinion of the Court of Appeals "that an indictment which tracks the statutory language and which provides the approximate time and place of the offense can be constitutionally sufficient." (Opinion, Page 4415) With that conclusion as a basis, the Court seemed to feel that the limited additional information contained in the "Means" paragraphs was a bonus and that even without those paragraphs, "the information was amply sufficient to inform the defendants that they were being accused of engaging in one broad conspiracy purposed to deceive investors and to manipulate the price of Richards Packing in furtherance of that purpose." (Opinion, Page 4415)

The Court of Appeals although finding that "the defendants were being accused of a broad range of fraudulent activity whose purpose was to deceive the investing public", (Opinion, Page 4415) concluded that the Information was not constitutionally infirm because "It informed the defendants of the broad objectives of the conspiracy and the statutory elements allegedly violated, and it provided considerable detail about the specific activities done in furtherance of the conspiracy." (Opinion, Page 4415)

During the trial, substantial portions of the evidence were admitted, over objection by petitioner, for the purpose of establishing misrepresentations and fraudulent activity by the defendants despite the fact that there was no reference to such misrepresentations or fraudulent activities in the Information.

At the trial, Petitioner urged unsuccessfully that the admission of this evidence improperly permitted a variance between the proof and the charges as contained in the Information.

The Court of Appeals rejected petitioner's contentions and simply concluded that "The Information provided enough detail about major fraudulent acts of the three

defendants to permit the evidence of related facts shown to be and proved to be in furtherance of the conspiracy." (Opinion, Page 4417)

In this fashion, the Court of Appeals relegated to the category of "related facts" some of the principal charges in the case such as "the many oral misrepresentations concerning the projected earnings of Richards Packing, the 20 million dollars 'lined up' and the franchise placements, as well as various written misrepresentations contained in press releases, the use of the report prepared by Papworth, Deutsch's and Duboff's involvement in New Dimensions, and the timing of the 1969 Annual Report" (Opinion, Page 4416).

By virtue of the trial court's instructions to the jury, a finding by them of the existence of any misrepresentation or any fraud, whether or not referred to directly or indirectly in the Information, was sufficient to permit a guilty verdict.

Labelling all of this material as evidence of related facts does not change the ultimate result, which is that the jury was permitted to, and probably did, convict Petitioner on the basis of alleged misrepresentations and frauds which Petitioner learned about for the first time during the course of trial. The injustice of this result is exaggerated by the fact that it was not alleged or established at the trial that Petitioner, personally, made or participated in the making of any of those misrepresentations.

Lest there be any doubt of the importance of the role played in the jury's verdict by the evidence of these uncharged misrepresentations, it should be noted that the trial court, after advising the jury that it could convict if it found *any* misrepresentation, used as an example of misrepresentations with which defendants were being charged, statements with respect to the number of franchises sold by Richards. ***These alleged misrepresentations were not set forth in the Information.*** Moreover, during

the course of its deliberations, the jury, which only requested ten exhibits, specifically requested the press release of Richards containing the alleged misrepresentation as to the number of franchises sold.

The damage thus done to Petitioner was exacerbated by further portions of the Court's instructions in which the jurors were advised that there were additional misrepresentations claimed by the Government which the Court would leave to the recollection of the jury. Thus, it is not only possible that Petitioner was convicted solely on the basis of misrepresentations not alleged in the Information, it is even possible that as a result of errors in recollection or understanding on the part of jurors, Petitioner may have been convicted on the basis of misrepresentations not even charged by the Government.

At no time during the trial was the jury advised of the specific misrepresentations which the defendants had been charged with having made. In most cases where evidence was admitted as tending to establish a misrepresentation, the Government's position was asserted outside the hearing of the jury.

Similarly, with respect to the charges that Petitioner engaged with others in a fraudulent scheme, the Court merely instructed the jury that it could convict if it found the existence of a fraudulent scheme. The Court made no attempt to further define or describe the fraudulent scheme which Petitioner was charged with perpetrating. Only the jurors know what they considered to be a fraudulent scheme, if anything, and what was the basis for their determination of guilt.

Petitioner excepted to these portions of the Court's charge and raised the issue of error in the charge on appeal. The Court of Appeals disposed of this contention without comment, stating merely that in its opinion the trial court's charge was clear and concise and contained

all of the requisite elements which the jury was required to consider.

The Court of Appeals did not comment at all on the Petitioner's argument that the charges allegedly established at the trial and submitted to the jury were not supported by evidence before the Grand Jury. By the conclusion of the trial, it had become apparent from a review of the Section 3500 material delivered to the defendants, that substantial portions of the evidence had never been presented to the Grand Jury. Among other things, there did not appear to have been any testimony relating, even remotely, to the numerous misrepresentations charged to the defendants concerning various aspects of the business affairs of Richards. The trial court, on application of Petitioner, reviewed the Grand Jury minutes, advised counsel which witnesses had testified and concluded that the testimony before the Grand Jury was sufficient to support the indictment.

It is possible to infer with a reasonable degree of certainty, from the identity of those witnesses whose Grand Jury testimony was not available to the Petitioner, that their testimony was not related to the various misrepresentations. As a consequence, it would appear that Petitioner may have been and probably was convicted for having conspired to misrepresent and for aiding and abetting in the misrepresentation of certain facts about Richards despite the fact that no evidence of such misrepresentation was adduced before the Grand Jury, and that the Indictment handed down by that Grand Jury was not intended to charge him with making such misrepresentations.

Reasons for Granting the Writ

I. The Decision is in Conflict with Prior Decisions of the Supreme Court

The conflict between the decision of the Court of Appeals and prior decisions of the Supreme Court is most

simply and graphically revealed by contrasting the language of the Court of Appeals in this case with the language of two of the leading Supreme Court decisions on the subject.

The Court of Appeals, at page 4415 stated:

> "This Circuit has consistently held that an indictment which tracks the statutory language and which provides the approximate time and place of the events can be constitutionally sufficient."

On the other hand, this Court stated the law in *U.S.* v. *Hess,* 124 U.S. 483, 8 Sup. Ct. 571 (1888), at page 573, as follows:

> "The doctrine invoked by the Solicitor-General, that it is sufficient in an indictment upon a statute, to set forth the offense in the words of the statute, does not meet the difficulty here. Undoubtedly, the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged."

In the *Hess* case, the Court was dealing with a charge, similar to the charge in this case, that the defendant had devised a fraudulent scheme. The Court held that:

> ". . . all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment or implication, and the charge must be made directly, and not inferentially, or by way of recital." (P. 573)

The Court required that the ... me or artifice to defraud be stated:

> "with all such particulars as are essential to constitute the scheme or artifice, and to acquaint him [the defendant] with what he must meet on the trial."

The Court concluded that:

> "The absence of all particulars of the alleged scheme renders the count as defective as would be an indictment for larceny without stating the property stolen or its owner or party from whose possession it was taken."

The current validity of this principle was affirmed by this Court in *Russell* v. *U.S.*, 369 U.S. 768, 82 Sup. Ct. 1038 (1962), at page 1047:

> "It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,—it must descend to particulars.' United States v. Cruikshank, 92 U.S. 542, 558, 23 L.Ed. 588. An indictment not framed to apprise the defendant 'with reasonable certainty, of the nature of the accusation against him * * * is defective although it may follow the language of the statute.' United States v. Simmons, 96 U.S. 360, 362, 24 L.Ed. 819. 'In an indictment upon a statute it is not sufficient to set forth the offense in the words of the statute, unless those words of themselvese fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; * * *.' United States v. Carll, 105 U.S. 611, 612, 25 L.Ed. 1135."

The Court then quoted the language of *United States* v. *Hess, supra,* requiring that an accused be provided with such a statement of facts and circumstances as would inform him of the specific offense with which he is charged.

The Court of Appeals, to the contrary, concluded that a defendant's constitutional rights are protected if he is provided with information that he is "engaged in one broad conspiracy purposed to deceive investors and to manipulate the price of Richards Packing" and that he is "being accused of a broad range of fraudulent activities whose purpose was to deceive the investing public." (Opinion, Page 4415)

Perhaps, in recognition of its inability to reconcile its opinion with the prior decisions of this Court, the Court of Appeals refrained from all mention of *United States* v. *Hess, supra,* and merely noted the existence of *Russell* v. *United States, supra,* in passing and in another context despite the fact that the language quoted herein was quoted at length in petitioner's appellate brief.

With such a legal principle as a basis it is not surprising that the Court of Appeals felt that the limited specific information provided by the "Means" paragraphs was more than petitioner was entitled to and hence completely discounted his complaint that the Information was defective for lack of specificity.

It is clear that the "Means" paragraphs fail to satisfy the constitutional requirements of a clear and concise indictment. In the first place, they fail utterly to indicate in what way they are part of or connected with the charging paragraphs of the Information. Defendant is compelled to guess whether a fact set forth in the "Means" paragraph was intended to relate to a fraudulent scheme, a misrepresentation, a false pretense or a manipulation.

The Government's obligation to provide a defendant with a specific statement of the charges against him re-

quires more than that. As this Court has stated, the specifics of the generic crime "cannot be supplied by intendment or implication, and the charge must be made directly, and not inferentially, or by way of recital." *U.S.* v. *Hess, supra,* at page 573.

Secondly, even to the extent that the "Means" paragraphs could be treated as providing some of the specificity required by this Court, the facts set forth therein fall far short of what was required in this case. At most, they relate only to a limited portion of the charges and fail to refer in any way to major portions of the Government's case. For example, there is no reference in the "Means" paragraphs to the alleged misrepresentations about Richards.

It can hardly be said that petitioner was provided all of the material facts and circumstances which constituted the offense with which he was charged when he was able to be convicted of a misrepresentation which was never even mentioned, let alone described in detail, in the Information. No less is true of the possibility that he was convicted of a scheme to defraud on an Information which failed to describe the scheme, identify the persons defrauded, the time when they were defrauded or the nature of the money or property lost by reason of the fraud.

All that has been said with regard to Count I applies with equal force to Counts II and III, which are substantive versions of the fraud and misrepresentation charges contained in Count I.

Although it is conceded that Count IV, standing alone, is sufficient, a reversal of the convictions on Count I would require a reversal of the conviction on Count IV also. The reason for this is that the Court, in its instructions, advised the jury that they could convict petitioner on Count IV solely on the basis of a finding that he was a participant in the conspiracy and that the false offering circular was filed as part of that conspiracy. Since there

was no evidence connecting petitioner with the preparation of that offering circular, it is undoubtedly the fact that the finding of his guilt of that charge was purely the result of a finding of his guilt of the charge of conspiracy.

II. The Decision of the Court of Appeals Consitutes a Sanction by That Court of Such a Departure From Requirements of Due Process That it Calls for This Court's Exercise of its Power of Supervision

The decision of the Court of Appeals condones, and even sanctions, the practice by the Government of charging defendants, particularly in complex securities cases, with broad and general conspiracies and fraudulent schemes, using only the language of the statute. In this fashion the Government is enabled to create and modify theories of prosecution and to compel defendants to answer to wide-ranging charges, the details of which are learned for the first time at trial. Much has been written and this Court is well aware of the many dangers to due process arising out of the uncontrolled use of the conspiracy statute. We do not propose to discuss that issue in this petition. It is a fact, however, that the combination of a conspiracy charge with a description of the conspiracy in broad, generic, statutory language results in the complete abrogation of a defendant's right to due process.

If this decision is permitted to stand unchallenged, a defendant is subject to prosecution, conviction and imprisonment on charges never considered by a Grand Jury, never set forth in any indictment and perhaps, as in this case, conceived for the first time during the course of the trial.

One example from this case will suffice to illustrate the point. Among the few specific facts referred to in the Information, in one of the "Means" paragraphs, was the allegation that defendant had induced certain mutual funds to purchase Richards stock for the purpose of restricting the supply of that stock and causing a rise in its price.

There was no testimony before the Grand Jury to support even that limited allegation.

During the course of the trial only one witness from the mutual funds testified. He had been named as a co-conspirator. His testimony failed to establish that he had been induced to purchase Richards stock and he denied that he was a co-conspirator, even though he was a Government witness. Confronted with this gap in its proof the Government conceived the theory during the course of the trial that the inducement consisted of false representations as to the business affairs of Richards and on that basis the Court permitted considerable testimony about misrepresentations throughout the trial. No evidence whatsoever with respect to any of these misrepresentations had been submitted to a Grand Jury nor was there any reference to them in the Information.

Since Petitioner was not connected with Richards he was placed in the impossible position during the trial of defending against charges that he conspired with or aided others to make misrepresentations about which he learned for the first time at trial and which his lack of information about the company made it impossible for him to refute.

In effect, the prosecution with the consent of the Court, modified and added to the charging part of the Indictment.

A defendant may be required to defend only against charges asserted by a Grand Jury. Prosecuting attorneys and trial judges may not be permitted, by the use of broad, general indictments, to try and convict defendants on the basis of their opinion or understanding of what the charge is or should be.

The rule was clearly stated by this Court in *Russell* v. *United States, supra,* at page 771:

> "'If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been or what the grand

> jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment be [sic] a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed. * * * Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus charged, the restriction which the constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists."

See also *Stirone* v. *United States*, 361 U.S. 212, 80 S. Ct. 270.

The only way that defendant can be assured that his prosecution will be based solely on the charges as made by a Grand Jury is to require the prosecution to proceed by an indictment which sets forth the charges clearly, concisely and unambiguously with all of the facts and circumstances constituting the crime charged. Our courts cannot tolerate a concept of criminal prosecution which presumes a defendant's guilt and therefore holds that it is unnecessary that he be advised in full detail of the nature of the fraudulent schemes and practices and false representations with which he is charged.

III. The Question Involved in This Appeal Has Never Been Clearly Decided by This Court

Although this Court has had occasion to pass upon the sufficiency of indictments in the past and has expressed

itself generally on the subject, it has not had occasion to set forth the requirements for conspiracy indictments of the type here involved for use by lower courts in determining how extensive a recitation of specific facts and circumstances is required in order to comply with the constitutional necessity of specificity. In view of the large and constantly proliferating number of indictments of this type such guidance is essential. Indeed, Petitioner himself requires such guidance in view of the fact that he still faces trial on two similarly constructed indictments against him in the Southern District of New York. Originally there were five indictments including the instant one. However, Petitioner was acquitted after trial on one and the Government proposes to file a *nolle prosequi* with respect to a second.

Moreover the issue is of great importance to members of the bar throughout the country who are regularly confronted with problems identical to those resulting from the vagueness of this Information.

CONCLUSION

Because the decision of the Court of Appeals is in conflict with prior decisions of this Court and because it thereby sanctions impermissible departures from due process, a decision of this Court clarifying the law is urgently required. For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, N.Y., July 24, 1975.

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 569, 570, 571—September Term, 1974.

(Argued January 20, 1975 Decided June 26, 1975.)

Docket Nos. 74-2026, 74-2027, 74-2065

UNITED STATES OF AMERICA,

Appellee,

v.

MILTON COHEN, BERNARD DEUTSCH, and STANLEY DUBOFF,

Defendants-Appellants.

Before:

WATERMAN, HAYS and MULLIGAN,

Circuit Judges.

Defendants appeal from judgments of conviction, United States District Court for the Southern District of New York, Ward, *J.*, entered upon jury verdict finding defendants Cohen, Deutsch and Duboff guilty on all four counts of an information superseding a sixteen count indictment. One count charges conspiracy to violate federal securities laws and the federal mail fraud statute, and three counts charge substantive violations of federal securities laws in the filing, publication, and mailing of a false and misleading offering circular and of mailing confirmation slips.

Held, inter alia, that the information was sufficient to charge the defendants with a conspiracy whose overall purpose was to manipulate the price of Richard Packing Company; there was no prejudicial variance between the allegations charged in the information and proved at the trial; the evidence was sufficient to convict the defendants on all counts; and there was no error in the conduct of the trial justifying reversal for a new trial.

Affirmed.

GERALD A. FEFFER, STEVEN A. SCHATTEN, JOHN D. GORDAN III, Asst. United States Attorneys, PAUL J. CURRAN, United States Attorney, *for Appellee.*

FREDERICK H. BLOCK, EDWARD ORENSTEIN, New York City, *for Appellant Cohen.*

MARVIN B. SEGAL, Segal & Hundley, New York City, *for Appellant Deutsch.*

MORTON S. ROBSON, Zissu, Lore, Halper & Robson, New York City, *for Appellant Duboff.*

WATERMAN, *Circuit Judge:*

Milton Cohen, Bernard Deutsch, and Stanley Duboff were convicted after a seven week jury trial in the United States District Court, Southern District of New York, on all counts of a four count information, filed April 23, 1974, and, on appeal, they seek to have the convictions reversed. Count 1 of the information charged that the defendants and fourteen named co-conspirators conspired in connection with the sale of the common stock of Richard Packing Company, Inc. (hereinafter "Richard Packing") to commit fraudulent acts in violation of various sections of

the federal securities laws. Counts 2 and 3 charged the defendants with fraud in the offer and sale of certain securities in violation of 15 U.S.C. §§ 77q and 77x, and with aiding and abetting that fraud in violation of 18 U.S.C. § 2. Count 4 of the information charged the defendants with mailing a false and misleading offering circular for a public offering of Richard Packing common stock in violation of 15 U.S.C. §§ 77j, 77x, 17 Code of Federal Regulations 230.256, and with aiding and abetting the mailing of a false and misleading offering circular in violation of 18 U.S.C. § 2.

On July 12, 1974 the trial judge sentenced Deutsch to concurrent terms of three years imprisonment on each count, and on July 16, 1974 Duboff to concurrent terms of three years imprisonment on each count, and Cohen to concurrent terms of six months imprisonment on each count.

We affirm the convictions of each of the appellants.

Richard Packing was organized as a Minnesota corporation on July 19, 1967. It was a successor to a partnership organized in January 1967 by appellant Milton Cohen and his brother Henry D. Cohen. Richard Packing was primarily engaged in the business of processing and selling meat and meat products, and Milton Cohen was president of the company and served on its board of trustees. In August 1967 Richard Packing effected an underwritten public offering of 100,000 shares of its common stock at an initial offering price of $2.25 a share. At the time of this public offering the Cohen brothers owned 375,000 shares of stock, which was restricted and was reserved to Richard Packing management.

In 1968 Milton Cohen began to entertain thoughts of developing Richard Packing into a fast food franchising operation similar to McDonald's Corp., and he enlisted various people to promote this venture. Deutsch and Duboff, who were registered representatives employed by

Jaffee & Co., a New York brokerage company, became financial consultants to Richard Packing. A management team of former McDonald employees was assembled. Status Marketing Corporation, a recently formed business, promoted by Richard Packing, whose only client was Richard Packing and on whose Board of Directors Milton Cohen served, was entrusted with the dual tasks of developing a marketable franchising package and with the selling of francises. The fast food franchises were for "Circus Wagon Restaurants" the trade-name developed for the outlets to be built by Richard at franchised locations. Some franchise agreements were closed and good-faith progress deposits made. The relationship between Richard Packing and Status Marketing was generally concealed during this period.

In the first quarter of 1967 the stock of Richard Packing, traded on the over-the-counter market, sold for a high bid price of 5⅝. Thereafter and thrugh the first half of 1970 the stock rose dramatically in value, reaching a high of 53½. A second Regulation A offering of 10,000 shares of common stock was issued in March 1969. Three affiliated Mutual funds—Financial Dynamics Fund, Financial Venture Fund, and Financial Industrial Fund (hereinafter collectively the Denver Funds)—purchased great amounts of the publicly held shares available for trading and eventually acquired 75% of these shares. Then, during the summer of 1970 the price of Richard Packing fell precipitously and the Denver Funds unloaded their shares at approximately $1 a share.

During this same period the business operations of Richard Packing also soured. It had trouble obtaining adequate financing to fulfill real estate and construction contracts for its franchising commitments, and a number of franchise contracts were canceled, requiring return of the cash deposits. In the first half of 1970 Richard Packing

was forced to sell some of its meat facilities in order to avoid reporting an operating loss for fiscal 1970. Status Marketing Corporation became bankrupt in early 1970. Notwithstanding these problems, however, Richard Packing advanced over a million dollars to a subsidiary company, Resort Products, which dealt in the leasing of dune buggies.

Throughout this period the defendants were striving to push up the price of Richard Packing stock and to maintain the image of a successful and rapidly developing company. Deutsch in the fall of 1968 interested Hugh Deane, a stockbroker with institutional accounts who was employed by Wood, Walker & Company, in Richard Packing. He accomplished this in part by giving earning projections of $1.00 a share in 1969, and $2.50 and $3.00 a share within the next two or three years. Cohen soon afterward confirmed these figures to Deane. In January 1969 Deane grew concerned over a drop in the price of Richard Packing, and Deutsch reassured him by reporting to him that there was a large private placement of unregistered and unissued shares which was about to be closed, and "I want the stock at 28 to 30 and ultimately much higher, and I suggest that you buy more and I am going to buy more behind you." Nevertheless, in late 1969 and early 1970 Deane became quite anxious about the financial condition of Richard Packing and he repeatedly called Cohen requesting information from Cohen about the contents of a 1969 annual report, as yet unpublished, and Cohen told him that the report would be forthcoming and that the delay in the report's publication was caused by the accountants.

Meanwhile, in February 1970, Deutsch told Deane:

> Don't be concerned, Hugh. Forget the annual report. It is not significant. I have 15 to 20 million lined up to handle the 200 Richard—the circus wagons that we have sold.

In April 1970 Deane received the Annual Report. Richard Packing never received the "15 to 20 million" for financing, nor had 200 Circus Wagon franchises been sold.

From September 1968 until March 1969 Kelly, Andrews & Bradley (KAB), a New York brokerage firm, traded 18,000 shares of Richard Packing stock. Bernard Shwidock was the president of KAB during this period. KAB had opened for business on September 12, 1968 with a purchase of Richard Packing stock on the recommendation of Deutsch and Duboff. In mid-September 1968 Deutsch and Duboff told Shwidock that "we don't give away all this business for nothing" and suggested a 50% kickback on the profits Shwidock was making from its trading in Richard Packing and other stocks. Shwidock later counteroffered a 30% kickback. Deutsch and Duboff accepted the 30% arrangement upon certain conditions: if the trading in the stock was done exclusively by Deutsch or Duboff; if they received at the end of each month their percentages of the net profits made by Shwidock's trading; if KAB engaged in no "front run" orders; and if the arrangement was secret. After this agreement had been made Deutsch or Duboff would telephone Shwidock and tell Shwidock that he had bought Richard Packing at a certain price from a certain broker, or that he had sold stock at a certain price to a certain broker, and Shwidock would then confirm the transaction. KAB made $50,000 from trading in Richard Packing over the next seven months, $15,000 of which went to Deutsch and Duboff. By a subsequent agreement the kickback money was paid to a Switzerland bank which in return provided KAB with worthless investment circulars. Also, Deutsch and Duboff controlled nominee accounts at KAB for Morginstin and Harris, who were Deutsch's brother-in-law and Duboff's father-in-law, respectively. These accounts were the most active accounts at KAB, and the purchases and sales in the accounts were wholly directed by Deutsch and Duboff.

KAB also played a central role in the second Regulation A offering which was effective March 11, 1969. Alvin Malmon, counsel to Richard Packing and a member of its board of directors, prepared the offering circular on information supplied by Cohen. Cohen also reviewed Malmon's final draft. The offering circular stated that the 10,000 share offering was "public," and that it was "not underwritten." The circular also stated that the price per share would depend on the market price of shares at the time of the sale, and that there was "no assurance" that any or all of the offering would be subscribed. All the representations in the circular were shown to be false. Arrangements of private placement had been agreed to prior to the offering. Shwidock had met the defendants in New York, and Deutsch had introduced Shwidock to Cohen and identified Shwidock as the man who would send the proceeds of the offering at $28 per share to Cohen at Richard Packing. After this meeting Cohen then sent Shwidock a letter which said in part, "I would appreciate your handling of the sale. We would not expect to get less than $28.00 per share." Duboff directed the placement of the 10,000 shares as follows: 2,000 shares to KAB's trading account; 3,000 to Morginstin and Harris, and 5,000 to Loeb, Rhoades & Co., clearing for Jaffee & Co., for the account of Financial Venture Fund. The bulk of the KAB trading account purchases covered short positions on Richard Packing stock. KAB sent $280,000 to Richard Packing, with KAB having made both trading profits and a commission on the arranged sales of the 10,000 share offering.

KAB began experiencing financial difficulties in March 1969, and from March 1969 Duboff and Deutsch began directing sales through two other New York brokerage firms, V.F. Naddeo and Alessandrini & Co. In December 1969 New Dimension Securities Corp. began business with

Deutsch and Duboff as undisclosed principals. Richard Packing had the largest customer account at New Dimension, on which account no trading was done, and Richard Packing's money was eventually returned. Again, Deutsch and Duboff directed the trading in Richard Packing stock, most of which were Jaffee & Co. purchases on account of the Denver Funds. The New Dimension trading profits that were generated through Richard Packing stock transactions exceeded $100,000. These profits in part went to finance lavish expenditures in the purchase and renovation of a New York townhouse, purportedly for New Dimension, but actually for Deutsch and Duboff.

Financial Venture Fund, one of the affiliated Denver Funds, became active in Richard Packing stock in March 1969 shortly after the Fund became operative. It had $45,000,000 to invest in high-risk high-growth companies. The portfolio manager of this fund was Jack Hurley who had earlier been introduced to Deutsch through Hugh Deane. Having confidence in Richard Packing the Denver Funds during the next year purchased 75% of the publicly available stock of Richard Packing, purchasing the stock through their brokerage account at Jaffee & Co. The evidence at the trial showed that the purchases by the Denver Funds were induced by continuing misrepresentations by the defendants of the financial position of Richard Packing. There were repeated overstatements of the number of franchises which had been sold or were being constructed, or were in operation. Deutsch also fed Hurley inflated earnings projections. A report on Richard Packing, prepared by Michael Papworth and not intended for publication, was sent to the Denver Funds. In this report, among other inaccuracies, was the statement that Richard Packing had entered an agreement to acquire a New York meat processing company, though in fact no agreement had been reached to do so, and an acquisition

offer by Richard Packing had been rejected by the other company.

The 1969 Richard Packing Annual Report, which did accurately describe the financial condition of the corporation, was never received by the Denver Funds. The report was finally readied by April 1970 and there was conflicting testimony at trial that the report was mailed in either April or July of 1970. In March 1970 Cohen had instructed Bass & Co., the company's public relations firm, that

> I want the finished year-end statement to be mailed to Richard Packing Company, 790 So. Cleveland at the cheapest rate of mailing.
>
> We will distribute them to stockholders from this office.
>
> I Do Not wish this statement to be distributed to any media whatsoever. Only our stockholders are receiving this report and we will do that distributing. Please make sure these instructions are followed to the letter. Please call me if you have any further suggestions.

The conspiracy count in its two introductory paragraphs identifies the defendants and the co-conspirators, set forth the two-year period in which the conspiracy occurred, and states the specific statutes allegedly violated. The third paragraph of the count, drawn in the language of 15 U.S.C. § 77q, charges that the defendants and co-conspirators conspired to employ devices, schemes and artifices to defraud, to obtain money and property through material misrepresentations and omissions, and to engage in transactions which operated as a fraud and deceit on purchasers of Richard Packing common stock. The fourth paragraph of the count, drawn in the language of 18 U.S.C. § 1341, charges that the defendants used the mails in the execution of the fraudulent scheme. The next paragraph states that

the defendants employed manipulative devices and contrivances in contravention of Rule 10(b)-5 (17 CFR 240.10b-5).

The "means" paragraph of this count adds specificity to these broad allegations. Among the means stated to achieve the ends of the conspiracy were: the control of Deutsch and Duboff over accounts which restricted the available supply of Richard Packing stock and which created the appearance of market activity; the secret kickback arrangement with Shwidock and KAB; the Regulation A offering; the inducement by which Denver Funds purchased Richard Packing through controlled accounts; and the filing and mailing of a false and misleading offering circular. The overt acts, separately stated at the end of the conspiracy count, set forth acts in March 1969 concerning the Regulation A offering; Cohen's letter to Shwidock; the purchases of the stock by KAB and Jaffee & Co.; KAB's issuing of a check; and by a reallegation of the facts stated in Counts 2 and 3 of the information, the mailing of offering circulars and confirmation letters.

It is the contention of the defendants that this information was insufficient to apprise them of what they should be prepared to meet at the trial and to prevent double jeopardy problems in the event of further criminal proceedings against them in the future. See *Russell* v. *United States,* 369 U.S. 749, 763-764 (1962). The Government believes that the information was amply sufficient to inform the defendants that they were being accused of engaging in one broad conspiracy purposed to deceive investors and to manipulate the price of Richard Packing in furtherance of that purpose. This Circuit has consistently held that an indictment which tracks the statutory language and which provides the approximate time and place of the offense can be constitutionally sufficient. *United States* v. *Salazar,* 485 F.2d 1272 (1973), cert. denied, 415 U.S. 985 (1974); *United States* v. *Sperling,* 506

F.2d 1323 (1974); *United States* v. *Palmiotti,* 254 F.2d 491 (1958). In the present case the information provided the defendants with considerably more detail than simply stating the time and place of the offense and quoting the criminal statute; the means paragraph spelled out the kickback scheme, the false Regulation A offering circular; the inducement to the Denver Funds, and the controlled accounts. We agree with the Government's contention. Read in its entirety, the conspiracy count indicates that the defendants were being accused of a broad range of fraudulent activity whose purpose was to deceive the investing public, which in this case was primarily the Denver Funds, and to manipulate the price of Richard Packing common stock for the defendants' benefit. Although the information is far from a model of clarity and precision, we cannot say that the conspiracy count taken as a whole was so deficient as to be constitutionally infirm. It informed the defendants of the broad objectives of the conspiracy and the statutory elements allegedly violated, and it provided considerable detail about the specific activities done in furtherance of the conspiracy. On the basis of the record we can anticipate no conceivable double jeopardy problems arising in the future.

The arguments the defendants raise to challenge the sufficiency of the information as to the substantive counts, counts 2, 3, and 4, are wholly without merit. The information in these counts tracks the statutory language, provides precise information of the specific acts, the date of each occurrence, and the persons involved. The second and third counts incorporate by specific reference the "means" paragraph of Count 1; Count 4 incorporates Counts 2 and 3. Without the necessity of a more detailed discussion it is obvious that these counts of the information were sufficiently specific to apprise the defendants of the charges against them so that they could prepare their defenses.

Related to their argument that Count 1 of the information was so insufficient that they could not prepare defenses to it, the defendants also claim that there was a prejudicial variance between the conspiracy charge in the information and the conspiracy the Government proved at the trial. The information did not include specific allegations of the following items of evidence introduced at trial: the many oral misrepresentations concerning the projected earnings of Richard Packing, the 20 million dollars "lined up" and the franchise placements, as well as various written misrepresentations contained in press releases, the use of the report prepared by Papworth, Deutsch's and Duboff's involvement in New Dimension, and the timing of the 1969 Annual Report. Compare *United States* v. *Koss*, 506 F.2d 1103 (2 Cir. 1974). Cohen's participation in the conspiracy was shown at trial to have been, in no small part, participation in repeated misrepresentations about the success that Richard Packing was enjoying, and these misrepresentations were not all specifically spelled out in the information. However, the Government was, in essence, charging that the defendants conspired illegally to manipulate the price of Richard Packing shares, and in so doing fraudulently to deceive the investing public. Central to this deception were the material misrepresentations included in the Regulation A offering circular which Cohen helped to prepare and which he reviewed. The many oral misrepresentations by Cohen on such matters as earnings projections, the Status Marketing-Richard Packing relationship, and the placement of franchises were not independent acts separate and apart from the conspiratorial central fraudulent activities and unrelated to them, but were integral to the very core of the overall scheme and in furtherance of that scheme. The Government need not, when charging conspiracy, set out with precision each and every act committed by the conspirators in the furtherance

of the conspiracy, *Wong Tai* v. *United States,* 273 U.S. 77, 81 (1927); *Thornton* v. *United States,* 271 U.S. 414, 423 (1926); *United States* v. *Koss,* 506 F.2d 1103 (2 Cir. 1974); *United States* v. *Kenny,* 462 F.2d 1205 (3 Cir. 1972).[1] The information provided enough detail about major fraudulent acts of the three defendants to permit the admission of evidence of related facts shown to be and proved to be in furtherance of the conspiracy.

We hold that Count 1 of the information was constitutionally sufficient to apprise the defendants of the nature of the charges against them, that of conspiring with each other to violate the federal securities and mail fraud statutes through the illegal manipulation of Richard Packing stock. Similarly, as stated *supra,* the arguments that the charges in the information's remaining three counts are constitutionally insufficient are entirely without merit.

Duboff contends that the prejudice he maintains he suffered because of the generality of the allegations in the information was compounded by the failure of the court to grant his pre-trial requests for further particulars. He claims this failure is reversible error. We do not agree. After an informal meeting between counsel for defendants and government counsel on January 14, 1974 counsel for Cohen requested that the court order the Government to furnish further particulars and a pre-trial discovery. A pre-trial conference before the trial judge was then held on February 28, 1974. As a result of these meetings the Government on March 27, 1974 provided all defendants with a bill of particulars, and then later furnished amendments to the bill on April 12, 1974. The bill of particulars supplemented the "means" paragraph of the con-

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[1] Five codefendants-appellants, Sternkopf, Kropke, Stapleton, Kunz and Murphy, sought review by certiorari of the affirmances of their convictions. Their separate petitions were denied, 409 U.S. 914 (1972).

spiracy count by setting forth facts concerning the defendants' control of the Morginstin and Harris accounts at KAB; the directing by the defendants of the controlled trading accounts at KAB, New Dimension and V.F. Naddeo; the undisclosed interest of Deutsch and Duboff in New Dimension; and Cohen's control over the Richard Packing trading accounts. Also, the bill of particulars spelled out the information's alleged overt acts in greater factual detail and provided the defense with the names of others involved in the conspiracy who had not been mentioned in the information. Whether a bill of particulars should be provided at all and, if ordered provided, its scope and the extent of its specificity, are matters within the discretion of the trial judge. *United States* v. *Salazar*, 485 F.2d 1272 (2 Cir. 1973); *United States* v. *Koss*, 506 F.2d 1103 (2 Cir. 1974). We are unable to discover any prejudice to the defendants that could have resulted from what Duboff vaguely states was a failure to provide further particulars. Duboff, himself, at no time formally moved for a bill of particulars, although he states that an oral motion was made at the pre-trial conference before the trial judge. No defendant moved to dismiss the incident before trial, and the fact that the defendants had complete access to government files makes exceedingly unpersuasive the defendants' claims that they were surprised at trial.

Cohen and Duboff argue that there was insufficient evidence to sustain their convictions on all four counts; Deutsch limits his objection to the insufficiency of the evidence to support his conviction on Count 4. We find that the evidence, viewed in the light most favorable to the Government, established an ample basis for the jury to find all three of the defendants guilty beyond a reasonable doubt on each of the four counts charged.

Duboff's and Cohen's arguments that the evidence was insufficient to convict them on the conspiracy count pri-

marily concern their claims that this count of the information was inadequate and the claimed variance between the conspiracy charged in the information and the evidence of conspiratorial activity the Government offered at trial. They urge that their convictions be tested against only that evidence which just tends to prove the narrowest possible construction of the information. We have no difficulty in rejecting such an approach, for the information is sufficient to support a broader interpretation of the conspiracy the Government alleged, a conspiracy which the Government quite handily proved at trial.

The evidence sufficed to show a continuing agreement among the principals to manipulate the price of Richard Packing stock through misrepresentations of the franchising operations of the company, through the directed and controlled trading in the company's shares of stock, and through the inaccuracies contained in the Regulation A offering circular. The trial judge gave clear and proper instructions on the elements necessary to find a conspiracy: the presence of an unlawful agreement; the knowing and wilful participation of a member; the commission of overt acts in the furtherance of the purpose of the unlawful agreement.

As to Cohen, the evidence, taken most favorably to the Government, showed that Cohen provided Deane with inflated earnings projections and gave him the impression that Status Marketing was an enterprise independent of Richard Packing. He, in connection with his attorney, prepared and reviewed the offering circular which the evidence showed to be a false and misleading one. He participated in, and encouraged, the publication of false and misleading press releases. Throughout the time period of the conspiracy's successful existence he was profiting through the sales of Richard Packing shares of stock. Thus, while Cohen's participation was not as extensive as his codefendants, there was sufficient evidence against him

in the case for a jury to find that beyond a reasonable doubt he wilfully and knowingly joined a conspiracy to manipulate the stock of Richard Packing.

As for Duboff, his claim that the evidence was insufficient to convict him must be considered frivolous. There was overwhelming evidence in the record to establish his complicity in the conspiracy. His participation centered on the financial machinations which lay at the very core of the conspiracy.

The trial court also fully instructed the jury that they could not convict unless they found the defendants had been engaged in a single conspiracy rather than engaged in separate or multiple conspiracies. Cohen objects that the court's instruction that ". . . if you find that the government has failed to prove the existence of only one conspiracy, you must find the defendants not guilty" was an 'all or nothing" charge similar to the one found impermissible in *United States* v. *Kelly,* 349 F.2d 720, 757-758 (2 Cir. 1965), cert. denied, 384 U.S. 947 (1966). Such instructions have been held proper in recent cases. See, *e.g., United States* v. *Sperling,* 506 F.2d 1323, 1341 (2 Cir. 1974); *United States* v. *Bynum,* 485 F.2d 490, 497 (2 Cir. 1973).[2] Cohen points out that the jury would be hesitant to acquit Deutsch and Duboff, anyway, regardless of whether the evidence tended to show a single conspiracy or proved multiple conspiracies, and therefore this instruction forced the jury to convict Cohen as well. This view misconstrues both the evidence and the instructions of the court. The court joined the above-quoted instruction with

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[2] Certiorari was sought and granted here on grounds unrelated to this language of the charge to the jury. The judgment was vacated and the case remanded to the Second Circuit for further consideration of the unrelated grounds, *Bynum* v. *United States,* 417 U.S. 903 (1974). The Second Circuit has reinstated the vacated judgment, 513 F.2d 533 (2d Cir. 1975.)

other instructions, which required the jury to find that Cohen entered the conspiracy wilfully, and which required the jury to consider each defendant's actions individually. In the context of the entire charge the jury, if the evidence had warranted such a result, could have convicted Deutsch and acquitted Cohen.

Cohen also argues that the evidence does not support the jury's conclusion that there was only one conspiracy. It is true that Cohen's codefendants were pursuing other related fraudulent activities concurrently with their activities in manipulating the price of Richard Packing stock. Even though Cohen did not participate in every one of the other frauds perpetrated by Deutsch and Duboff, or even though he may not have known of the specific details of these extra activities, the evidence showed that Cohen was participating with his codefendants in the continuing scheme to manipulate the price of Richard Packing stock. Cf. *United States* v. *Overton*, 470 F.2d 761, 766 (2 Cir. 1972), *cert. denied*, 93 S.Ct. 1528 (1973). Throughout the trial the court viewed the evidence as limited to proof tending to establish alleged fraudulent activities related to Richard Packing, and repeatedly instructed the jury to limit its consideration to relevant matters. The issues of whether there was a single conspiracy and of Cohen's participation in the fraudulent activities were fairly put to the jury, and this court ought not to disturb the jury's resolution of both issues.

Cohen also argues that he was seriously prejudiced by the failure of the trial judge to sever his case from that of his codefendants. Cohen's theory here is similar to his theories advanced to support his earlier points: Deutsch and Duboff were pursuing other frauds in the sale of Richard Packing stock, and the evidence of these other frauds was so fully detailed before the jury that, despite limiting instructions, prejudice to Cohen was in-

evitable. Of course the grant or the denial of motions for severance is within the sound discretion of the trial judge, who is in the best position to evaluate the potential for prejudice to the movant, and decision on the motion will rarely be disturbed on review. *United States* v. *Koss, supra; United States* v. *Sperling, supra; United States* v. *Bynum, supra; United States* v. *Cassino,* 467 F.2d 610 (2 Cir. 1972), *cert. denied,* 93 S.Ct. 957, 959 (1973). In this case, although Cohen's complicity was not as extensive as that of his codefendants, nor his acquisitive rapacity as pervasive as that of his codefendants, we cannot say that a severance of his case was necessary to guarantee him a fair trial. The jury could find from all the evidence, and quite correctly did find, that there was a single conspiracy to manipulate Richard Packing stock, and that Cohen was a principal actor in the activities to advance the conspiracy. The fact that Deutsch and Duboff devised methods for securing additional profits for themselves while the conspiracy was in effect by their secret arrangements with KAB and New Dimension, does not detract from the finding that the three defendants were joined in a single scheme illegally to manipulate the price of Richard Packing stock and thereby to defraud the public investors in that stock. Cohen's role in these objectives was central to the success of the conspiracy ,and his overall activity was not so disproportionate to that of his codefendants that his case needed to be severed to assure that he receive justice. *United States* v. *Koss, supra.*

Deutsch argues that the evidence was insufficient to support convictions on Count 4 of the information which charged the defendants with unlawfully using the mails to transmit false and misleading offering circulars. The use of the mails to transmit false and misleading offering circulars, and to send out confirmation slips of sales resulting from such circulars, was, Deutsch contends, too remote

in relation to the scheme to defraud to violate the mail fraud statute, 18 U.S.C. § 1341, and that rather than being an affirmative element of the scheme to defraud, the use of the mails did not further the purpose of the conspiracy but was only an incidental act of the kind which normally accompanies any transaction, but which does not further its purpose or its success. The information, however, does not accuse the defendants of violating the Mail Fraud Statute, but rather of violating certain sections of the securities laws, 15 U.S.C. §§ 77j, 77x, and securities regulation 17 CFR 230.256. These sections set forth the material required to be set forth in an offering circular and require that the circular be provided to persons to whom an offer is made. Section 77x makes wilful violation of the statute or regulation a criminal offense. Reading these sections together, it is apparent that the defendants were not charged with mail fraud under 18 U.S.C. § 1341 but with publishing a false and misleading offering circular. The reference to the use of the mails to carry and transmit these circulars specifies the mode by which the publication was effected. Even if Deutsch's construction of the count were correct, the sending of broker confirmation slips to cover stock transactions, which is alleged in Count 4 through the incorporation in that count of the allegations contained in Counts 2 and 3, is sufficient to sustain convictions under 18 U.S.C. § 1341. See *United States* v. *Marando,* 504 F.2d 126 (2 Cir.), *cert. denied sub nom Berardelli* v. *United States,* —— U.S. ——, 95 S.Ct. 317 (1974). Here a principal aspect of the scheme to defraud investors was the activity surrounding the Regulation A offering of 10,000 shares in March 1969. The offering circular was false in material respects. The applicable regulation requires that a written confirmation be sent by the broker, and here these were shown to have been sent through the mails. It was vital to the success of the conspiracy that

the appearance of normality be maintained throughout so as to conceal the actual state of affairs. *United States* v. *Marando, supra.* Any failure to follow the generally accepted procedures in the handling of over the counter stock sales would have perhaps aroused suspicions at a time when the Denver Funds were becoming heavily involved in Richard Parking. The mails were neither "incidental" nor "remote" to the scheme to defraud, but, to the contrary, were rather a necessary and integral step in the furtherance of the scheme.

The defendants also raise numerous additional claims of trial error, arguing that there were occurrences at the trial which were sufficiently grave and had consequences so prejudicial that these errors require a reversal of the convictions and a remand for a new trial. We find, however, from a studious examination of the record, that these objections are so wholly meritless as to deserve no extended discussion. We mention a few of them. Contrary to the assertions of Deutsch, the trial judge performed his duties in commendable fashion, and throughout the lengthy, and at times heated, trial treated the defendants with complete fairness. The instructions of the judge to the trial jury were concise and clear and included all the requisite elements which the jury was required to consider in order fairly to resolve the defendants' innocence or guilt.

The admissions of various items and of certain testimony into evidence, claimed to have been erroneously admitted, were correctly admitted, well within the discretion of the trial judge. For example, Ruth Appleton, Chief of the Branch of Small Issues of the SEC, testified and gave her expert opinion of the reach of the concepts of "underwriter" and "materiality." The admission of this testimony is challenged as having been prejudicial error. It is claimed that this testimony took away from the jury its power to resolve issues of ultimate fact.

Attorney Malmon who had handled Cohen's SEC matters for him and for Richard Packing had on cross-examination been made a defense witness and had previously testified as an expert on similar issues of "ultimate fact." The court recognized the desirability of this type of testimony in this involved case and, while giving properly limiting instructions, admitted such expert testimony into evidence. We hold the admission of such expert testimony, so admitted, was a proper exercise of the trial judge's discretionary power over the progress of the trial.

The trial was long and protracted, it dealt in substantial part with complex questions involving the securities laws. Expert testimony, subject to limiting instructions, was helpful to an understanding of the contested controversial issues requiring factual resolution by the triers-of-fact. Cf. *United States* v. *Brown,* 511 F.2d 920, 924 (2 Cir. 1975); *United States* v. *Fernandez,* 480 F.2d 726, 740 (2 Cir. 1973).

Convictions affirmed.

Judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS
For the
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of June one thousand nine hundred and seventy-five.

Present: HON. STERRY R. WATERMAN
HON. PAUL R. HAYS
HON. WILLIAM H. MULLIGAN
Circuit Judges,

74-2026
74-2027
74-2065

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MILTON COHEN, BERNARD DEUTSCH, STANLEY DUBOFF,
Defendants,

MILTON COHEN, BERNARD DEUTSCH, STANLEY DUBOFF,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

Judgment of the Court of Appeals.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed in accordance with the opinion of this court.

A. Daniel Fusaro,
Clerk.

By Vincent A. Carlin
Chief Deputy Clerk

Statutes and Rules Involved

Title 15, United States Code

§ 77j. Information required in prospectus

(a) Except to the extent otherwise permitted or required pursuant to this subsection or subsections (c), (d), or (e) of this section—

(1) a prospectus relating to a security other than a security issued by a foreign government or political subdivision thereof, shall contain the information contained in the registration statement, but it need not include the documents referred to in paragraphs (28) to (32), inclusive, of Schedule A of section 77aa of this title;

(2) a prospectus relating to a security issued by a foreign government or political subdivision thereof shall contain the information contained in the registration statement, but it need not include the documents referred to in paragraphs (13) and (14) of schedule B of section 77aa of this title;

(3) notwithstanding the provisions of paragraphs (1) and (2) of this subsection when a prospectus is used more than nine months after the effective date of the registration statement, the information contained therein shall be as of a date not more than sixteen months prior to such use, so far as such information is known to the user of such prospectus or can be furnished by such user without unreasonable effort or expense;

(4) there may be omitted from any prospectus any of the information required under this subsection which the Commission may by rules or regulations designate as not being necessary or appropriate in the public interest or for the protection of investors.

(b) In addition to the prospectus permitted or required in subsection (a) of this section, the Commission shall by rules or regulations deemed necessary or appropriate in the public interest or for the protection of investors permit the use of a prospectus for the purposes of subsection (b) (1) of section 77e of this title which omits in part or summarizes information in the prospectus specified in subsection (a) of this section. A prospectus permitted under this subsection shall, except to the extent the Commission by rules or regulations deemed necessary or appropriate in the public interest or for the protection of investors otherwise provides, be filed as part of the registration statement but shall not be deemed a part of such registration statement for the purposes of section 77k of this title. The Commission may at any time issue an order preventing or suspending the use of a prospectus permitted under this subsection, if it has reason to believe that such prospectus has not been filed (if required to be filed as part of the registration statement) or includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein, in the light of the circumstances under which such prospectus is or is to be used, not misleading. Upon issuance of an order under this subsection, the Commission shall give notice of the issuance of such order and opportunity for hearing by personal service or the sending of confirmed telegraphic notice. The Commission shall vacate or modify the order at any time for good cause or if such prospectus has been filed or amended in accordance with such order.

(c) Any prospectus shall contain such other information as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.

(d) In the exercise of its powers under subsections (a), (b), or (c) of this section, the Commission shall have authority to classify prospectuses according to the nature and circumstances of their use or the nature of the security, issue, issuer, or otherwise, and, by rules and regulations and subject to such terms and conditions as it shall specify therein, to prescribe as to each class the form and contents which it may find appropriate and consistent with the public interest and the protection of investors.

(e) The statements or information required to be included in a prospectus by or under authority of subsections (a), (b), (c), or (d) of this section, when written, shall be placed in a conspicuous part of the prospectus and, except as otherwise permitted by rules or regulations, in type as large as that used generally in the body of the prospectus.

(f) In any case where a prospectus consists of a radio or television broadcast, copies thereof shall be filed with the Commission under such rules and regulations as it shall prescribe. The Commission may by rules and regulations require the filing with it of forms and prospectuses used in connection with the offer or sale of securities registered under this subchapter.

May 27, 1933, c. 38, Title I, § 10, 48 Stat. 81; June 6, 1934, c. 404, § 205, 48 Stat. 906; Aug. 10, 1954, c. 667, Title I, § 8, 68 Stat. 685.

Statutes and Rules Involved

Title 15, United States Code

§ 77q. Fraudulent interstate transactions

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemptions provided in section 77c of this title shall not apply to the provisions of this section.

May 27, 1933, c. 38, Title I, § 17, 48 Stat. 84; Aug. 10, 1954, c. 667, Title I, § 10, 68 Stat. 686.

Statutes and Rules Involved

Title 15, United States Code

§ 77x. Penalties

Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

May 27, 1933, c. 38, Title I, § 24, 48 Stat. 87.

Title 15, United States Code

§ 78j. Manipulative and deceptive devices

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

June 6, 1934, c. 404, § 10, 48 Stat. 891.

Rules of the Securities and Exchange Commission

Rule 10b-5. Employment of Manipulative and Deceptive Devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

Federal Rules of Criminal Procedure

Rule 7. The Indictment and the Information

(c) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-143

STANLEY DUBOFF, PETITIONER

v.

UNITED STATES OF AMERICA

No. 75-146

BERNARD DEUTSCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the information under which they were tried was insufficient to inform

them of the charges against them, that the evidence adduced at trial proved crimes in addition to those charged in the information, and that the charge to the jury was inadequate.

After a jury trial in the United States District Court for the Southern District of New York, petitioners and co-defendant Milton Cohen were convicted on all four counts of an information charging them with conspiracy to violate the securities laws and to commit mail fraud by manipulating the common stock of Richard Packing Company, in violation of 18 U.S.C. 371 (Count 1); fraud in the offer and sale of such stock, in violation of 15 U.S.C. 77q and 77x and 18 U.S.C. 2 (Counts 2 and 3); and mailing a false and misleading offering circular for a public offering of such stock, in violation of 15 U.S.C. 77j, 77x, 17 C.F.R. 230.256, and 18 U.S.C. 2 (Count 4). Each petitioner was sentenced to concurrent terms of three years' imprisonment. The court of appeals affirmed in a comprehensive opinion, upon which we rely (Pet. App. 1a-21a; 518 F.2d 727).[1]

1. Petitioners contend that the information under which they were tried was not sufficiently specific.[2] Count 1 charges that from July 1968 to July 1970 petitioners, co-defendant Cohen, and others conspired

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[1] "Pet." refers to the petition in No. 75-143.

[2] At the suggestion of the trial court, and with the consent of the parties, the sixteen-count indictment was superseded by the four-count information; the parties agreed that the information would be treated as if it were the indictment (Pet. 2-3).

to commit securities fraud and mail fraud in connection with a purported public offering of common stock of Richard Packing Company; that as part of this plan petitioners used the mails to transmit false and misleading information concerning a purported public offering of such stock, for which a Form 1-A notification had been filed with the Securities and Exchange Commission; and that petitioners made false and misleading statements of material facts and used the mails as part of the plan (Inf. 2-3).[3]

Count 1 alleged that petitioners and others used the following means to carry out the conspiracy: Between July 1968 and July 1970, for the purpose of inflating the price of Richard Packing common stock, petitioners caused accounts that they controlled to purchase and sell Richard Packing stock so as to restrict the available supply of the stock to the investing public and to create an appearance of demand and market activity; that in October 1969 petitioners arranged with the brokerage firm of Kelly, Andrews, and Bradley (KAB) and others to trade in the stock according to petitioners' directions and to pay them a secret kickback of 30 percent on the profits derived therefrom; that this profit, which amounted to approximately $15,000, was deposited in a Swiss account by KAB for petitioners; that petitioners caused KAB and co-conspirator Bernard Shwidock (the president of KAB) to sell 10,000

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[3] A copy of the information ("Inf.") is being lodged with the Clerk.

shares of the stock, which were purportedly being offered to the public, to accounts that they controlled; that beginning about March 1969, they induced named mutual funds in Denver, Colorado, to buy stock from accounts, which they controlled, through Jaffee and Company, brokers, again for the purpose of raising the price, restricting the available supply to the investing public and creating an appearance of demand for the stock; that by these practices they caused the price of the stock to rise from $25 to $53 per share, but that eventually these mutual funds suffered losses approximating $5.1 million; that on March 11, 1969, petitioners caused an offering circular to be filed with the Securities and Exchange Commission; and that the offering circular was false and misleading because it failed to disclose that the 10,000 shares purportedly being placed on the market were actually being placed with accounts controlled by petitioners and through which petitioners' co-conspirators were receiving compensation (Inf. 3-6; see Pet. App. 10a).

Count 2 alleged that from March 11, 1969, to July 1970, petitioners committed the substantive acts alleged in Count 1 and made various specified mailings (Inf. 7-8).

Count 3 alleged that from March 11, 1969, to July 1970, petitioners obtained money by false statements of material facts. This count incorporated the allegations of Count 1 and alleged that petitioners used the mails to communicate with Financial Dynamics of Denver, a mutual fund (Inf. 9-10).

Count 4 alleged that on or about March 11, 1969, petitioners used the mails to send (to the persons named in Counts 2 and 3) false and misleading offering circulars that purported to offer 10,000 shares of stock to the general public but which in fact were being sold exclusively to accounts controlled by petitioners (Inf. 10-11).

Neither petitioner moved before trial to dismiss the indictment, from which the information was adapted (Pet. App. 14a). As a result of pre-trial conferences, the government provided all defendants with a bill of particulars. The bill of particulars, and its amendments, set out full details concerning the controlled accounts of various firms and individuals, by which the price of the stock was manipulated (Pet. App. 13a-14a). Petitioners were afforded full access to the prosecution's investigatory and trial preparation files (Pet. App. 14a).

2. Petitioners claim that the information "failed to describe the scheme to defraud, identify the persons defrauded, the time when they were defrauded or the nature of the money lost" (Deutsch Pet. 9). This is inaccurate. The information described, in the detail we have narrated above, the outlines of petitioners' program to inflate the price of Richard Packing shares and collect kickbacks from trading. The details of the operation were further spelled out in a bill of particulars. Not only was the scheme itself and its operation fully described in the information and bill of particulars, but the information also alleged that the principal persons defrauded were the

three Denver affiliated funds, which purchased three quarters of the shares and lost approximately $5.1 million when, as was inevitable, the stock collapsed (Pet. App. 8a-11a).

The information thus set out the elements of the offense charged and apprised petitioners of the charge they were required to meet; the information was specific enough to protect petitioners against being placed in jeopardy once more for the same offense. *Russell* v. *United States*, 369 U.S. 749, 763-764; *Hagner* v. *United States*, 285 U.S. 427, 431; *United States* v. *Mann*, 517 F.2d 259 (C.A. 5). Petitioners appear to contend that the information was defective because it did not narrate the government's evidence in greater detail. That, however, is not its function.[4] See *Hamling* v. *United States*, 418 U.S. 87, 117: "It is generally sufficient that an indictment set forth the offense in the words of the statute itself * * *."

Moreover, it has long been settled that an indictment charging conspiracy to commit an offense need not allege with technical precision all the elements essential to the commission of the offense that is the object of the conspiracy. *Wong Tai* v. *United States*, 273 U.S. 77, 81; *United States* v. *Perez*, 489 F.2d 51, 70 (C.A. 3), certiorari denied, 417 U.S. 945. Peti-

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[4] *United States* v. *Hess*, 124 U.S. 483, 484, upon which petitioners rely, does not support their position. The indictment there alleged, in the most perfunctory manner, a scheme to defraud but did not identify any particulars of the scheme. The information in this case identified the scheme and supplied considerable factual background.

tioners' claim that they were surprised by the proof offered by the government is not well founded; they failed to file any pretrial motion challenging the sufficiency of the information, and they had complete access to the government files in their preparation for trial (Pet. App. 14a-15a).

3. There was no prejudicial variance between the conspiracy charged and the conspiracy proved at trial. The court of appeals exhaustively summarized the evidence (Pet. App. 2a-10a) and correctly concluded: "The information provided enough detail about major fraudulent acts of the three defendants to permit the admission of evidence of related facts shown to be and proved to be in furtherance of the conspiracy" (Pet. App. 13a).

4. Petitioners' complaint that the grand jury that returned the original indictment may never have been acquainted with some of the evidence presented at trial is not relevant. The function of that body is to ascertain the existence of probable cause, not to review all of the evidence that can be presented at trial. An indictment valid on its face is not subject to attack predicated on the nature of the evidence presented to the grand jury. *United States* v. *Calandra*, 414 U.S. 338, 345; *Costello* v. *United States*, 350 U.S. 359.

5. Finally, petitioner Duboff's assertion, without supporting argument, that the court's charge left the jury confused about which misrepresentations might be used to convict petitioners (Duboff Pet. 2), is not supported by the record (see, *e.g.*, Tr. 5285,

5313, 5321). As the court of appeals held: "The instructions of the judge to the trial jury were concise and clear and included all the requisite elements which the jury was required to consider in order fairly to resolve the defendants' innocence or guilt" (Pet. App. 20a).

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

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